STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 9, 2009
v	No. 280834 Wayne Circuit Court
CHENIER HOLLOWAY, Defendant-Appellant.	LC No. 06-011352-01

Before: Saad, C.J., and Davis and Servitto, JJ.

DAVIS, J. (*dissenting*).

I respectfully dissent.

This case arises out of a shooting death that occurred on the night of December 23, 1999, just outside of a lounge in Detroit. The victim had gotten into several physical altercations with other patrons that night, but another member of his group apparently persuaded the victim and his party to leave. The victim was shot once in the upper chest as he went out the door of the lounge; the shot proved fatal. Witnesses stated that two individuals, a man in a wheelchair and a man in a beanie hat, were near the victim, and that the man in the hat handed a gun to the man in the wheelchair immediately after the shooting. The man in the wheelchair was later identified as Timothy Bonds, who was eventually convicted of being an accessory to the victim's murder. Bonds testified that he was one of three African-Americans present in wheelchairs at the lounge on that night, but that defendant was not with him and that defendant was not the shooter.

Six years after the homicide, Tiyest Harrell came forward after seeing a television program about the shooting, which offered a reward for information. She gave a statement to police that at about 2:00 a.m. on December 24, 1999, defendant, Bonds, and another man named Dwight Bell[1] arrived at her house. She stated that Bonds asked whether they could stay at her house for some time, stating that Bell had had a confrontation with someone at the lounge and "his boy" had shot someone. Initially, she told police that Bonds was pointing at defendant while he explained the shooting, but then she changed her statement and said that Bonds was pointing at Bell. At trial, she testified that, in fact, both Bell and defendant were standing in the general direction in which Bonds pointed, but that Bonds pointed "more toward [defendant]."

[1] Bell's last name was initially unknown and assumed by police to be Bonds, simply because he was Timonthy Bonds's cousin. The police were unable to locate Bell, and none of the witnesses at trial knew of Bell's current whereabouts.

She was convinced that defendant had in fact shot someone because "[i]f you didn't do it you won't let nobody say you did it," but defendant "just sat there like a lump on a log." Harrell explained that she knew that Bonds was known to carry a nine-millimeter gun under the seat of his wheelchair. A nine-millimeter shell casing had been found at the lounge following the homicide. Harrell further explained that defendant was wearing a beanie hat.

Thereafter, one of the victim's friends, who had been in the victim's party at the lounge and present when the homicide occurred, selected defendant out of a photographic lineup as the man in the hat who handed the gun to the man in the wheelchair. The identification was on the basis of defendant's ears, and that witness conceded that he had only observed the man in the hat in profile, whereas the photographs were face-on. Another member of the victim's party at the lounge was unable to identify the man in the hat; a third member of the victim's party – who had asked the prosecutor to testify because he had been friends with the victim – repeatedly and affirmatively stated that defendant was *not* the man in the hat. Other witnesses also stated that defendant was not the man with Bonds. The owner of the lounge testified that he was familiar with Bonds, who was a regular, but that he did not recognize defendant and had never seen defendant at the club. One of the security personnel who was on duty at the club testified that defendant was not the person pushing Bonds around that night. A former friend of Bonds testified that on the night of the shooting, he saw Bonds walking with Bell toward the lounge, and Bell was carrying "some type of rifle;" shortly thereafter, he heard shots. Another of the victim's friends testified that he left the lounge before the victim and, after reaching his car, heard shots and then saw three people, one of whom was in a wheelchair and another of whom was wearing a beanie, run by him saying something about having "hit him;" the man in the beanie had hazel eyes, and defendant's eyes are not hazel.

The significant issue in this case is whether the trial court properly admitted some or all of Harrell's testimony. On the first day of trial, defense counsel explained to the trial court that, on the basis of discussions with defendant, defense strategy would be to permit Harrell to testify regarding Bonds's accusation of defendant notwithstanding the fact that it was hearsay; the defense would then focus on discrediting Harrell. I agree with the majority that, therefore, any hearsay objection to Bonds's hearsay statements testified to by Harrell have been waived and there is no error for us to review. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000).

The same is not true of Harrell's testimony regarding defendant's silence. Although trial counsel failed to object to Harrell's testimony regarding defendant's silence, the defense waiver only extended to Harrell's testimony regarding Bonds's statements. Although the issue of defendant's silence is unpreserved, it is not waived. The issue, then, is whether this plain error – which the majority acknowledges – affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). My conclusion is that it very well could have, particularly given the stale and thin additional evidence tending to inculpate defendant.

There is no *absolute* ban on admission of a defendant's silence. However, a defendant's silence is only admissible under very limited circumstances: specifically, to impeach a defendant's own testimony that he was *not* silent, *People v Boyd*, 470 Mich 363, 374-375; 682 NW2d 459 (2004), or to provide context to statements that a defendant *did* make. *People v McReavy*, 436 Mich 197, 213-217; 462 NW2d 1 (1990). Defendant did not testify in this case.

Early Michigan case law recognized that "only when the statements are made to a party to be affected by them under circumstances from which his acquiescence in their truth can be fairly inferred if not expressed" may such tacit admissions be admitted as substantive evidence. *Dawson v Hall*, 2 Mich 390, 393 (1852). Subsequent development explained that a defendant's silence in the presence of some statement by another party is insufficient to make that statement chargeable to the defendant without some *additional* conduct – not necessarily verbal – that would tend to demonstrate acquiescence by the defendant. See *People v Courtney*, 178 Mich 137, 148-152; 144 NW 568 (1913). Our Supreme Court finally explained that tacit admissions through silence absolutely "may not be used as substantive evidence of a defendant's guilt" and "is not probative evidence of the truth of" a statement made by another. *People v Hackett*, 460 Mich 202, 214-215; 596 NW2d 107 (1999), citing and reaffirming *People v Bigge*, 288 Mich 417, 420; 285 NW 5 (1939).

A tacit admission by a defendant, based on a statement made by another person in the defendant's presence, is admissible evidence. MRE 801(d)(2)(B). However, it has been the rule for more than one hundred fifty years that a tacit admission *by silence alone* is not; indeed, it does not constitute an admission *at all*. This is precisely the kind of alleged admission by defendant that was admitted here.

I therefore conclude that plain error occurred: defendant's silence in the face of Bonds's statement while pointing at defendant that his boy shot someone did not constitute admissible evidence to show that defendant did, in fact, shoot someone. Furthermore, the remaining evidence against defendant was, at best, ambivalent. Many of the prosecution's own witnesses testified that defendant was not, or could not have been, involved in the murder. Even though the trial court ultimately denied defendant's motion for a directed verdict, it observed that it was "left wanting personally for the quality of evidence." On the basis of the record and the thin other evidence against defendant, I am concerned that "the error could have been decisive of the outcome," and likely affected defendant's substantial rights. *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994). The assertion of defendant's silence in the face of Bonds's direct assertion that defendant had shot the victim stands out as a ringing bell in what was otherwise a contradictory and dense fog of six-year-old recollection. In light of this conclusion, I do not address the remainder of defendant's arguments on appeal.

I would reverse and remand for a new trial.

/s/ Alton T. Davis